2003

Betteridge v. Betteridge : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

Andra D. Betteridge, **Appellee,** **vs.** **Brent R. Betteridge,** **Appellant.**	**Case No. 20030588CA** **Civil No. 014901312 DA** **Third District Court, Salt Lake County** **ORAL ARGUMENT REQUESTED**

REPLY BRIEF OF THE APPELLEE

On appeal from the Third District Court
For Salt Lake County, State of Utah
Honorable William B. Bohling, Presiding

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JURISDICTION

The Utah Court of Appeals has original jurisdiction of this appeal pursuant to Utah Code § 78-2a-3(h) (1996) as this is an appeal from an order entered in a domestic relations case.

STATEMENT OF ISSUES

FIRST ISSUE: Appellant/Respondent's (hereinafter Mr. Betteridge) First Issue claims the trial court abused its discretion in finding that cohabitation did not exist. This First Issue is a mixture of law and fact. The trial court found as facts that no common residence had been established and that no sexual conduct evidencing a conjugal relationship had been established. Based upon those findings, the trial court reached the legal conclusion that cohabitation did not exist so as to terminate the alimony Mr. Betteridge was ordered to pay to Appellee/Petitioner (hereinafter Ms. Betteridge).

SECOND, THIRD AND FOURTH ISSUES: Mr. Betteridge's Second, Third, and Fourth Issues claim "abuse of discretion" by the trial court when, after reaching the conclusion that cohabitation did not exist so as to terminate the alimony order, the trial court found Mr. Betteridge in contempt of the Order of the court, granted Ms. Betteridge a judgment for alimony arrearages, and awarded Ms. Betteridge the attorneys fees and costs incurred in defending against the cohabitation claim.

STANDARD OF REVIEW

"The determination of whether given circumstances constitute cohabitation require the application of the terms of a court order to a given set of facts. The process is in

reality a mixed question of fact and law . . ." *Haddow v. Haddow,* 707 P.2d 669, 671 Utah 1985); *Pendleton v. Pendleton*, 918 P.2d 159, 160 (Ut. App. 1996). When challenging the adequacy of the trial court's findings of fact that no common residence was established and that no sexual conduct evidencing a conjugal relationship had been established the appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous. *Shinkoskey v. Shinkoskey*, 2001 UT App 44, ¶ 10 n. 5; 19 P.3d 1005, 1008; *see also Sigg v. Sigg*, 905 P.2d 913 n. 7 (Ut. App. 1995)

A "clear abuse of discretion" standard of review applies to the trial court's conclusion of law that the elements of cohabitation had not been proven so as to trigger the statutory termination of alimony, and its orders finding Mr. Betteridge in contempt of an Order of the court, *Bartholomew v. Bartholomew*, 548 P.2d 238, 240 (Utah 1976); *Marsh v. Marsh*, 1999 UT App 14, ¶ 8; 973 P.2d 988, 990, granting Ms. Betteridge a judgment for alimony arrearages, and awarding Ms. Betteridge her attorneys fees and costs incurred in defending against the cohabitation claim. *Moon v. Moon*, 1999 UT App 012, ¶ 33; 973 P.2d 431, 439; *Lyngle v. Lyngle*, 831 P.2d 1027, 1030, n. 4 (Ut. App. 1992); *see also* Utah Code § 30-3-3 (1998).

STATEMENT OF THE CASE

NATURE OF THE CASE

This appeal seeks review of the finding of the trial court that cohabitation did not exist so as to terminate the order of alimony contained within the original Decree of Divorce. Mr. Betteridge also challenges the trial court's order holding him in contempt of the Order of the court requiring the payment of alimony, the trial court's entry of judgment against Mr. Betteridge for delinquent alimony payments, and the awarding of the attorneys fees and costs incurred by Ms. Betteridge in seeking the enforcement of the Order of the court.

COURSE OF PROCEEDINGS

This is the second appeal filed by Mr. Betteridge to orders entered by the trial court in the case, this court having previously affirmed the Decree of Divorce. (Utah Court of Appeals, No. 20030065; non-published opinion).

The Decree of Divorce [Rec. 237-240] was entered on December 23, 2002, pursuant to the trial to the court on September 27, 2002, and its ruling on October 8, 2002. The Decree contained a judgment for alimony at $1,600 per month in favor of Ms. Betteridge for the period commencing February, 2002 through October, 2002, and ordered continuing alimony at $1,600 per month to be paid by Mr. Betteridge to Ms. Betteridge for no longer than the duration of the marriage (25 years) or until otherwise terminated by law.

Mr. Betteridge refused to pay the judgment for alimony as granted in the Decree of Divorce and in January, 2003 a Writ of Continuing Garnishment was issued and served upon Mr. Betteridge's employer to effect collection of the judgment awarded in the Decree of Divorce. [Rec. 342-363]

Mr. Betteridge also refused to pay the ongoing alimony as ordered by the court and an Order to Show Cause in re Contempt was issued on January 8, 2003. [Rec. 292-293]. At a hearing before the Domestic Commissioner on January 30, 2003 the Commissioner certified to the trial court for an evidentiary hearing the issue of Mr. Betteridge's contempt and recommended entry of judgment for alimony arrearages which had accrued for November, 2002 through the date of hearing. [Rec. 335-338] The Order and Judgment was entered June 25, 2003. [Rec. 593-596]

A Notice of Appeal was filed on July 21, 2003. The case was selected for mediation, but was not resolved. The court ordered Mr. Betteridge to file his brief by May 12, 2004. A stipulated extension of time was granted to June 2, 2004. A brief was "lodged" with the court on June 2, 2004, with a subsequent, significantly changed brief "filed" with the court on June 9, 2004.

DISPOSITION AT TRIAL COURT

The evidentiary hearing on the issue of Mr. Betteridge's contempt was heard by the trial court on February 19, 2003 [Rec. 669] and February 28, 2003 [Rec. 670] and a subsequent evidentiary hearing took place on June 13, 2003 [Rec. 831] on Mr. Betteridge's claim that he should not be held in contempt for failing to pay alimony on

the grounds that he did not have the ability to pay. [**Note: All volumes of the transcripts of hearing will be hereinafter referred to as "Tr." followed by the page number and line of the transcript.]**

The court received items into evidence and heard the testimony of Ms. Betteridge [Tr. 7-19; 233-259], a former co-worker of Ms. Betteridge [Tr. 20-66], two of the children of Mr. and Mrs. Betteridge [Tr. 67-78; 79-86], the individual to whom Ms. Betteridge rented a room in her apartment [Tr. 86-109], three neighbors of Ms. Betteridge [Tr. 121-150; 150-163; 205-212], Mr. Betteridge [Tr. 213-217], Mr. Betteridge's sister [Tr. 163-185], and Ms. Betteridge's father, mother and sister [Tr. 185-195; 196-205; 218-233].

The court stated its understanding of the requirements of the law, its findings of fact, its application of the law to the facts, and its conclusion that the elements had not been met and that cohabitation was not found to exist. [Tr. 296: 18-25; 297: 1-17]

Subsequent to its finding that cohabitation did not exist, the court proceeded to find Mr. Betteridge in contempt but accepted Mr. Betteridge's argument that he relied upon cohabitation as the reason why he did not pay alimony. Because the court found a good faith basis for Mr. Betteridge's non-payment, he directed counsel to propose a means by which Mr. Betteridge would bring his obligations into complete compliance rather than be subject to sanctions for deliberate avoidance of his alimony obligation. [Tr. 300: 4-20]

Because the court found that Ms. Betteridge had prevailed in her proceeding to enforce the order of the court and defend against the cohabitation case, she was entitled to and was awarded reasonable attorney's fees. [Tr. 300: 21-24]

At the evidentiary hearing held June 13, 2003 [R. 831] and after receiving items into evidence and hearing the testimony of Mr. Betteridge [Tr. 6-59] the court stated its finding that Mr. Betteridge was aware of the order of the Court requiring payment of $1,600 per month in alimony, that he had the ability to pay as ordered, and that he refused to pay as ordered. [Tr. 84:22-25; 85: 1-9] The court further stated that it was struggling to find that Mr. Betteridge could pay more than $1,600 per month and thus might not have the ability to pay on the accrued arrearages, and that the only payments previously made by Mr. Betteridge were the payments made as a result of the garnishments. [Tr. 85: 10-22]

The court did not award Ms. Betteridge attorney fees for the hearing on June 13, 2003 because of Mr. Betteridge's financial condition and noted that the court was offering him some relief by limiting the amount he was required to pay per month to $1,600.00 [Tr. 87: 4-10] and ordered that Mr. Betteridge could purge himself of the contempt by abiding by the court's order for payment of $800.00 per paycheck to Ms. Betteridge. [Tr. 93: 5-23; R. 593-596]

RELEVANT FACTS WITH CITATION TO THE RECORD

The court recited the factors upon which its decision was based and the reasoning in which the court engaged in arriving at its conclusion. [Tr. 297:17-25; 298; 299; 300: 1-4]

1. Certain of Mr. Betteridge's Statement of Facts at pp. 3-7 of his brief and identified below mischaracterize the testimony in the attempt to mislead the Court:

a. Statement of Fact 1 states "Ms. Betteridge had another man . . . living in her apartment." Tr. 8:4-12. In answer to the question posed at Tr. 8:4-12: "Since you've been living in that apartment in Midvale, has anyone else lived there with you?" Ms. Betteridge answered: "For a short time I had rented a room because I needed the extra income because I was receiving nothing from my ex-husband".

b. Statement of Fact 2 states "Ms. Betteridge admitted Mr. Reinen spent the night in her apartment from October, 2002 to mid-January, 2003." Tr. 8:17-20; 9:1-2. The question posed at Tr. 8:17 was "And when did he move in?" Ms. Betteridge answered: "Under the circumstances he started renting the room from me the beginning of October . . . 2002." Similarly, Mr. Reinen's testimony was that he didn't spend the night in the apartment until he moved in as a roommate to help her pay her rent. Tr. 87:12-16.

c. Statement of Fact 5 states "Mr. Reinen testified Ms. Betteridge left a key under the mat so he could access the apartment when Ms. Betteridge was not at home." Tr. 88:16-22. Mr. Reinen's testimony actually states: "Well, when I was staying there there was times where she would leave the key under the mat so

I would be able to get in. That was very rare. I spent most of my time at my house." Tr. 88:20-22.

d. Statement of Fact 23 states "Mr. Reinen testified he primarily moved from Ms. Betteridge's apartment because of the litigation involving the termination of alimony". Tr. 88:5-11. Mr. Reinen's testimony actually states: "Well, mostly because of this stuff that's happening here, and people had left my apartment, so it wasn't so crowded . . . Well, just because, you know, I didn't want to cause any waves between anybody. So, you know, I was just, you know." Tr. 88:5-11. Mr. Reinen testified further regarding the crowded living arrangements in his own apartment and the circumstances allowing him to move back to his own apartment in mid-January. Tr. 99:10-25; 100:1-23; 101:7-17.

e. Statement of Fact 24 states "Ms. Betteridge's counsel admitted that his client had testified at the original divorce trial she had engaged in an extramarital affair". Tr. 272:10-13. This exchange was part of closing argument to the court in response to opposing counsel's argument that the court should presume the existence of sexual conduct because of testimony given at trial. Tr. 266: 17-21. The court stated its recollection of the testimony at the divorce trial and that its determination that fault would not influence the judgment in granting the divorce. Tr. 271:25; 272:1-14. Including this reference in the Statement of Facts in simply an attempt to reargue Mr. Betteridge's position in the trial court.

2. Examples of evidence in the record in addition to those identified by Mr. Betteridge which support the findings of the trial court and which were not marshaled by Mr. Betteridge include:

a. Jonnathen was residing temporarily in the apartment of Ms. Betteridge.

i) Testimony of Arthur Milne at Tr. 190:21-25; 191:4-8;

ii) Witness Corby Bray at Tr. 222:18-25; 223; 232:14-25; 233: 3-10;

iii) Witness Gwen Milne at Tr. 199:3-12; 200: 6-15

iv) Witness Brent A. Betteridge at Tr. 82:3-6;

v) Witness Aaron McTee at Tr. 149:2-25;

vi) Witness Sherry Shepherd at Tr. 207:10-25; 208; 209:1-16;

b. Jonnathen did not have a key to Ms. Betteridge's apartment.

i) Witness Corby Bray at Tr. 232:14-25; 233:3-10;

ii) Witness Aisha Shavazz at Tr. 154:10-14; 158:3-9.

c. Jonnathen was not in Ms. Betteridge's apartment when Ms. Betteridge wasn't, except on rare occasions, and Jonnathen did not have the intention or practice to be in the apartment when she wasn't there.

i) Witness Aisha Shavazz at Tr. 161:18-20;

ii) Witness Gwyn Milne at Tr. 205:3-8.

d. Some kind of romantic interest or relationship clearly exists based on pictures, gifts, kissing, attention, but that alone does not establish sexual conduct evidencing a conjugal association.

i) Witness Arthur Milne at Tr. 188: 6-25;

ii) Witness Gwen Milne at Tr. 199: 13-23;

iii) Witness Shawn Betteridge at Tr. 69:11-25; 70; 72; 77:10-25; 78:1-6

iv) Witness Brent A. Bettridge at Tr. 80:4-8; 82:22-25; 83:5-14;

v) Witness Aaron McTee at Tr. 127:2-9; 129:2-20.

3. Mr. Betteridge's Brief was "lodged" with the clerk of the above entitled court on June 2, 2004, and Mr. Betteridge's Brief containing significant changes was "filed" with the clerk of above entitled court on June 9, 2004.

4. Significant substantive differences exist in the Brief "lodged" on June 2, 2004 and the Brief "filed" on June 9, 2004 as follows:

a. Paragraph entitled "Statement of Facts" in June 2, 2004 Brief at pp. 4-5 compared to June 9, 2004 Brief at pp. 3-7;

b. Argument I in June 2, 2004 Brief at pp. 6-7 compared to June 9, 2004 Brief at pp. 9-12;

c. Argument II in June 2, 2004 Brief at p. 9 compared to June 9, 2004 Brief at p. 14.

SUMMARY OF ARGUMENT

The Trial Court's findings that the elements of cohabitation were not proven are not clearly erroneous. Mr. Betteridge fails to meet his burden to marshal the evidence. He is required to present in comprehensive and fastidious order every scrap of competent

evidence introduced at trial which supports the finding that there was no common residence for Ms. Betteridge and Jonnathen Reinen, and that there was no sexual conduct which was conjugal in nature. Mr. Betteridge cites to only some of the testimony of Ms. Betteridge and Mr. Reinen, fails to cite to any of the testimony of the 11 other witnesses, and simply re-argues his position that simply because Mr. Reinen paid rent it must be deemed admitted that Ms. Betteridge's apartment became a common residence. The testimony that the arrangement was temporary and in fact terminated after 3-1/2 months is disregarded, and the testimony regarding the restricted use of and access to the apartment is disregarded. With respect to sexual conduct evidencing a conjugal relationship, Mr. Betteridge points out testimony regarding a photo displayed, gifts exchanged at Christmas, kissing and attention paid in public and merely reargues his position at trial that the court must conclude that sexual conduct existed. No argument is advanced regarding the need for establishing the existence of a conjugal relationship of which the sexual conduct was a part. Having failed to marshal the evidence, Mr. Betteridge further fails to meet his burden of demonstrating that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous.

No Abuse of Discretion is Shown. In failing to meet his burden of demonstrating that the trial court's findings are clearly erroneous, the fact that no cohabitation existed must be accepted as true. If no cohabitation exists, the statutory provisions of Utah Code §30-3-5(9) (1998) that terminate alimony upon a finding of cohabitation are not applicable and Mr. Betteridge's argument that the trial court abused its discretion in

holding Mr. Betteridge in contempt for failing to abide by the order of the court, entering a judgment for alimony arrearages, and awarding Ms. Betteridge her attorney fees and costs incurred, must fail. It is within the sound discretion of the trial court to make findings of contempt, impose sanctions punishing contempt, award judgments for arrearages in court ordered payments, and award attorney fees and costs to the prevailing party.

Award of Attorney Fees on Appeal. Ms. Betteridge prevailed below and was awarded attorney fees and costs, and should be awarded her attorney fees and costs incurred in defending this appeal. Mr. Betteridge fails to make a good faith argument that the trial court's finding that no cohabitation existed was clearly erroneous. He merely reargues the case he made to the trial court.

Mr. Betteridge should be Sanctioned for Bringing a Frivolous Appeal and For Disregard of the Court's Rule. Mr. Betteridge failed to marshal the evidence to meet his burden of showing that the findings were clearly erroneous. He simply disagrees with the trial court's assessment of the weight of the evidence. There is no reasonable legal or factual basis for this appeal. The history of this case demonstrates that Mr. Betteridge has engaged in repeated appeals and has persistently refused to obey the order of the court regarding payment of alimony. The only alimony collected from Mr. Betteridge has been through garnishment or court ordered deduction from his paycheck. Ms. Betteridge has been required to incur significant legal fees in the enforcement of her rights and entitlements as awarded by the court. Significant court resources have been expended as a result of Mr. Betteridge's refusal to abide by the order of the court.

Further, Mr. Betteridge has abused the Rules of Appellate Procedure in the manner in which his brief on this appeal was filed, and within the filed brief, has obfuscated and mischaracterized the issues in attempt to mislead the court and provide legitimacy to his appeal.

ARGUMENT

I. THE TRIAL COURT'S FINDINGS OF FACT ARE NOT CLEARLY ERRONEOUS.

In challenging the adequacy of the findings made by the trial court, Mr. Betteridge must show that the trial court's findings are clearly erroneous. *Shinkoskey v. Shinkoskey*, 2001 UT App 44 ¶ 10 n. 5, 19 P.3d 1005, 1008; *Sigg v. Sigg*, 905 P.2d 908, 913 (Utah App. 1995). He must do more than merely reargue facts supporting his position. *Sigg*, at 913, n. 7. He is required to present in comprehensive and fastidious order every scrap of competent evidence introduced at trial which supports the finding that there was no common residence for Ms. Betteridge and Jonnathen Reinen, and that there was no sexual conduct which was conjugal in nature. The appellate court will review the evidence in a light most favorable to the trial court's findings. *Id.* at 910, n. 2. Then he is obliged to demonstrate that despite that evidence the court's findings are so lacking in support as to be against the clear weight of the evidence thus making them clearly erroneous. *Shinkoskey*, 2001 UT App at ¶ 10, n. 5.

Mr. Betteridge has failed to adequately marshal the evidence supporting the trial court's findings and then demonstrate that despite this evidence the findings are so

lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous.

A. Elements of Cohabitation.

"Cohabitation is comprised of the same two elements: (1) common residency and (2) sexual contact evidencing a conjugal association." *Haddow v. Haddow*, 707 P.2d 669, 672 (Utah 1985); *Pendleton v. Pendleton*, 918 P.2d 159, 160 (Utah App. 1996). Both elements must be established by a preponderance of the evidence in order to arrive at the conclusion that cohabitation exists. In his attempt to marshal the evidence pertaining to these two elements Mr. Betteridge identifies only some of the testimony of Ms. Betteridge and Mr. Reinen, fails to cite to any of the testimony of the 11 other witnesses, and simply re-argues his position at trial.

B. Common Residency.

Mr. Betteridge argues that Mr. Reinen paid rent so it must be deemed admitted by this fact alone that Ms. Betteridge's apartment became a common residence. This argument disregards the factual analysis required in Utah upon which a finding of common residency must be based. The Utah Supreme Court requires a showing by a preponderance of the evidence of a sharing of a common abode that both parties consider their principal domicile for more than a temporary or brief period of time. *Haddow*, 707 P.2d at 672. The holding in *Haddow* was applied to the facts in *Pendleton*, 918 P.2d at 160 when the Court of Appeals reversed the trial court's finding on the element of common residency. The determinative factors applied in *Pendleton* centered upon the

nature of the use of and access to the premises, and were whether the other party had a key and could come and go as he pleased and whether he regularly spent time in the premises in the absence of the other and was not merely a guest. The facts in *Pendleton* included possession of a key, and a practice of coming and going from the residence regardless of the presence of the other. *Id.*

Here, the trial court, having heard all of the testimony of all of the witnesses, stated

> I found more than credible the testimony that the young man, Jonnathen, was basically engaged in residing temporarily in the apartment of Ms. Betteridge as essentially an overflow area because of the extreme crowded conditions of his own apartment. I'm not satisfied from the evidence that that ever became his principal domicile.
>
> I'm persuaded after asking questions searchingly and hearing the testimony searchingly that he never had a key. That he was not over there except on rare occasions when Ms. Betteridge wasn't. That that wasn't part of the relationship that they had. That she basically didn't want him there when she wasn't there, and that wasn't his intention or practice to do so.
>
> In addition to that, it wouldn't appear to this Court that there was an established ongoing relationship. This was something that was temporary. I don't think the evidence establishes anything to the contrary.
>
> I don't have the impression that Jonnathen came and went, but rather he'd go there for the night, but wasn't the sort of thing where that was kind of the place he really hung out most of the time.
>
> It's clear that Ms. Betteridge and Jonnathen ate meals together from time to time. That they went out together. There's some dispute as to how much, but to me the evidence on that again doesn't establish this practice that they ate almost all meals together.

> There was clearly no financial comingling. In short, it seems to me that even though there was certainly a credible case presented, and I recognize that Mr. Betteridge's case had a code argument, it wasn't frivolous, that still that the burden was not met to establish common residency.

[Tr. 297:23-25; 298; 299:1-3]

Mr. Betteridge has failed to marshal all of the evidence that the arrangement was temporary and in fact terminated after 3-1/2 months, and all of the evidence regarding Jonnathen's restricted use of and access to the apartment. Further, he fails to demonstrate how all of the evidence so marshaled fails to support the trial court's finding that the arrangement was temporary and that no common residency existed. It is well established that the lower court's finding of fact will not be disturbed on appeal absent a showing that it is clearly erroneous. *Shinkoskey*, 2001 UT App 44 at ¶ 10 n. 5; *Kessimakis v. Kessimakis*, 1999 UT App 130, ¶ 8; 977 P.2d 1226, 1228; *Moon v. Moon*, 1999 UT App 12, ¶ 24; 973 P.2d 431, 436-7.

C. Sexual Conduct Evidencing a Conjugal Association.

The Utah Supreme Court has held that sexual contact in the cohabitation context means "participation in a relatively permanent sexual relationship akin to that generally existing between husband and wife." *Haddow*, 707 P.2d at 672. *See also*, *Knuteson v. Knuteson*, 619 P.2d 1387, 1389 (Utah 1980). In the *Haddow* opinion, the court evaluated the nature and extent of sexual contact between the parties and noted that the parties had been dating exclusively for about fourteen months, had engaged in the practice of spending the night together at lease once a week, had vacationed together to Hawaii and

had stayed the night together in Elko, Nevada during that period of time. The trial court's finding of cohabitation was reversed by the Supreme Court holding that while the facts established the presence of a relatively permanent sexual relationship, common residency had not been established. *Id.*

Here, the trial court, having heard all of the testimony of all of the witnesses, stated

> Likewise on the issue of sexual conduct evidencing a conjugal association, there was certainly no direct evidence of any sexual conduct. That was denied vehemently by Jonnathen and Ms. Betteridge. That's something that was not something either one admitted to.
>
> The evidence we had came from Mr. Lee who, to say the least, presented to this Court a person who seemed to be disturbed and have some kind of an obsessive relationship with Ms. Betteridge that clouded his credibility in the Court's mind, and certainly made what he had to say something less than completely believable.
>
> The best that he had to say was, you know, lights were going off and on, as Ms. Woresewaren's testified, but you know, Ms. Worsewaren's testimony had to do with one evening, observing until 11 o'clock at night. That doesn't seem to me to make a case for sexual contact, nor does Mr. Lee's observations of that, in the face of the parties denying it and no credible testimony otherwise coming to this Court's attention.
>
> There's clearly some kind of a romantic interest or relationship. There were the pictures, the gifts, the kissing, the attention and all of that, but I'm just not persuaded that that alone establishes sexual conduct evidencing a conjugal association. To draw that leap seems to me to be unfounded, and I don't believe the evidence supports it.

[Tr. 299:4-25; 300:1-3]

Mr. Betteridge has failed to marshal the evidence that a relatively permanent sexual relationship akin to that generally existing between husband and wife existed between Ms. Betteridge and Mr. Reinen. Further, he fails to demonstrate how all of the evidence fails to support the trial court's finding that no such relatively permanent sexual relationship akin to that generally existing between husband and wife was proven. In the absence of a showing that it is clearly erroneous the lower court's finding of fact should not be disturbed on appeal. *Shinkoskey*, 2001 UT App 44 at ¶ 10 n. 5; *Kessimakis*, 1999 UT App 130 at ¶ 8; *Moon,* 1999 Ut. App 12 at ¶ 24.

Having failed to marshal the evidence and demonstrate that the findings of the trial court on each of the required elements constituting cohabitation are clearly erroneous, the order and judgment of the trial court should be affirmed.

II. NO ABUSE OF DISCRETION.

The sound exercise of discretion requires the trial court to correctly apply the law to the facts. Unlike the trial court in *Garcia v. Garcia*, 2002 UT App 381 ¶¶ 6, 7, 8; 60 P.3d 1174, 1175-1176, there is no assertion here that the provisions of Utah Code § 30-3-5(9) were incorrectly interpreted.

A. Conclusion that Alimony Did Not Terminate.

Mr. Betteridge's failure to meet his burden of demonstrating that the trial court's findings are clearly erroneous means that the fact that no cohabitation existed must be accepted as true. *Moon*, 1999 UT App 12 at ¶ 24. Accordingly, if no cohabitation exists, the statutory provisions of Utah Code § 30-3-5(9) that terminate alimony upon a finding of cohabitation are not triggered. After making its determination that

cohabitation did not exist, the trial court did not abuse is discretion in concluding that the provisions of Utah Code § 30-3-5(9) did not apply.

B. Finding of Contempt.

It is within the sound discretion of the trial court to make findings of contempt and impose sanctions punishing contempt. *Bartholomew v. Bartholomew*, 548 P.2d 238, 240 (Utah 1976); *Marsh v. Marsh*, 1999 UT App 14, ¶ 8; 973 P.2d 988, 990.

Mr. Betteridge argues that the trial court abused its discretion in holding Mr. Betteridge in contempt for failing to abide by the order of the court, for the sole reason that it erred in failing to find cohabitation thus triggering the termination provisions of Utah Code § 30-3-5(9). Mr. Betteridge advances a theory based upon *nunc pro tunc* powers or the equitable remedy of *void ab initio* that by asserting a defense of cohabitation against a motion for enforcement of a court order requiring payment of alimony, he should not be found in contempt even when the cohabitation claim fails. The plain wording of the statute is not in dispute that alimony terminates when the cohabitation commenced. But if cohabitation is not proven to exist then alimony does not terminate. Raising the defense of cohabitation, even in good faith, would not immunize the delinquent alimony obligor from the contemptuous behavior. A finding of contempt is within the sound discretion of the court when it appears that the obligor knew of the existence of the order requiring him to pay, that the obligor had the ability to pay, and that the obligor refused to pay. Mr. Betteridge makes no argument that the court's

action is so unreasonable as to be classified as capricious and arbitrary, or a clear abuse of discretion.

In this case the trial court found on undisputed facts that Mr. Betteridge knew of the existence of the order requiring him to pay, that Mr. Betteridge had the ability to pay, and that Mr. Betteridge refused to pay. [Rec. 831; Tr. p. 85:3-10]. However, the trial court further exercised its discretion in recognizing Mr. Betteridge's claim of cohabitation as a reason for not payment in the trial court's choice of sanctions for the contempt, and ordered that Mr. Betteridge could purge himself of the contempt by paying $800.00 per paycheck to Ms. Betteridge. [Rec. 831; Tr. p. 93:3-18; Rec. 593-596]

Mr. Betteridge's failure to meet his burden of demonstrating that the trial court's findings are clearly erroneous means that the fact that no cohabitation existed must be accepted as true. *Moon*, 1999 UT App 12 at ¶ 24. Accordingly, if no cohabitation exists, the statutory provisions of Utah Code § 30-3-5(9) that terminate alimony upon a finding of cohabitation are not triggered. The order of the trial court finding contempt should be affirmed.

C. Entering a judgment for alimony arrearages.

It is within the sound discretion of the court to enter a judgment for unpaid alimony. Mr. Betteridge's only dispute with the entry of the judgment against him for alimony arrears which accrued from November, 2002 through June, 2003 is his insistence that the trial court was wrong in finding no cohabitation and thus alimony should have terminated as a matter of law.

Mr. Betteridge's failure to meet his burden of demonstrating that the trial court's findings are clearly erroneous means that the fact that no cohabitation existed must be accepted as true. *Moon*, 1999 UT App 12, ¶ 24. Accordingly, if no cohabitation exists, the statutory provisions of Utah Code § 30-3-5(9) that terminate alimony upon a finding of cohabitation are not triggered. The alimony accrued and was not paid and the order of the trial court entering judgment for the alimony arrearages should be affirmed.

D. Award of attorney fees and costs to Ms. Betteridge.

In an action to enforce the provisions of a divorce decree an award of attorney fees is based solely upon the trial court's discretion, regardless of the financial need of the moving party. *Lyngle v. Lyngle*, 831 P.2d 1027, 1030, n. 4. (Utah App. 1992). Mr. Betteridge's only dispute with the award of attorney fees and costs to Ms. Betteridge [Rec. 588-590] is that his insistence that she should not have been the prevailing party.

Mr. Betteridge's failure to meet his burden of demonstrating that the trial court's findings are clearly erroneous means that the fact that no cohabitation existed must be accepted as true. *Moon*, 1999 UT App 12, ¶ 24. Accordingly, if no cohabitation exists, the statutory provisions of Utah Code § 30-3-5(9) that terminate alimony upon a finding of cohabitation are not triggered. The order of the trial court awarding attorney fees and costs should be affirmed.

III. AWARD OF ATTORNEY FEES ON APPEAL

Ms. Betteridge prevailed against the defense of cohabitation below and was awarded her attorney fees and costs and should be awarded her attorney fees and costs

incurred in defending this appeal. *Moon*, 1999 UT App 012 ¶ 33; *Lyngle*, 831 P.2d at 1031, n. 4. Mr. Betteridge failed to meet his burden of demonstrating that the trial court's findings are clearly erroneous. *Moon*, 1999 UT App 12, ¶ 24. He merely reargues the case he made to the trial court.

IV. MR. BETTERIDGE SHOULD BE SANCTIONED FOR BRINGING A FRIVOLOUS APPEAL AND FOR ABUSE OF THE COURT'S RULES

A. Frivolous Appeal.

Mr. Betteridge failed to marshal the evidence and failed to meet his burden of demonstrating that despite that evidence the court's findings are so lacking in support as to be against the clear weight of the evidence thus making them clearly erroneous. *Shinkoskey*, 2001 UT App 44, ¶ 10, n. 5. Mr. Betteridge simply disagrees with the trial court's assessment of the weight and import of the evidence. There was no reasonable legal or factual basis for this appeal. *Backstrom Family Ltd. P'ship v. Hall*, 751 P.2d 1157, 1160 (Ut. App. 1988).

The history of this case as shown in the Record on Appeal demonstrates that Mr. Betteridge has engaged in repeated appeals and has persistently refused to obey the order of the court regarding payment of alimony. The only alimony collected from Mr. Betteridge has been through garnishment or court ordered deduction from his paycheck. His refusal to pay resulted in considerable financial hardship to Ms. Betteridge and she has been required to incur significant legal fees in seeking the enforcement of her rights and entitlements as awarded by the court. Significant court resources have been

expended as a result of Mr. Betteridge's refusal to abide by the order of the court. Mr. Betteridge's course of conduct is similar to that observed by this court in *Porco v. Porco*, 752 P.2d 365 (Utah App. 1988) and similar relief should be awarded to Ms. Betteridge.

B. Abuse of the Rules of Appellate Procedure.

Mr. Betteridge has abused the Rules of Appellate Procedure in the manner in which his brief on this appeal was filed, and within the filed brief, has obfuscated and mischaracterized the issues in an attempt to mislead the court and provide legitimacy to his appeal.

Rule 24, Rules of Appellate Procedure, which proscribes the form of briefs such as paper size, margins, typeface, binding, color of cover, and contents of cover, provides that the clerk may reject a brief which is not prepared in accordance with the rules and the party may have five (5) days to bring the brief into compliance with the rules. The rule is not intended to permit significant substantive changes in briefs. Rule 24(e)

A comparison of the brief "lodged" with the court on June 2, 2004 with the brief "filed" on June 9, 2004 shows significant substantive changes in the section entitled "Statement of Facts". The June 2, 2004 brief contains 11 statements at pp. 4-5, none of which reference the location in the Record or Transcript, compared with 27 statements of fact in the June 9, 2004 brief at pp. 3-7. Further significant substantive changes appear in Argument I on pp. 6-7 of the June 2, 2004 brief when compared to pp. 9-13 in the June 9, 2004 brief ; and significant substantive changes appear in Argument II on p. 9 of the June 2, 2004 brief when compared to p. 14 of the June 9, 2004 brief.

Further, in Statement of Facts 1, 2, 5, 23, and 24 contained in the June 9, 2004 brief Mr. Betteridge has obfuscated and mischaracterized the facts and issues in an attempt to mislead the court and provide legitimacy to his appeal.

Appropriate sanctions should be imposed against Mr. Betteridge for filing a frivolous appeal and for abuse of the rules of appellate procedure.

CONCLUSION

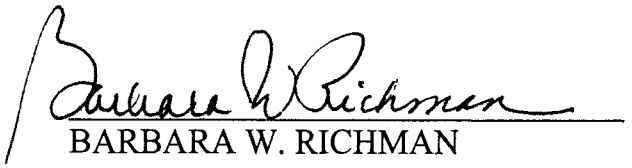
The trial court's findings of fact that there was no common residency and no sexual conduct evidencing a conjugal association should be affirmed. The trial court's conclusion of law that no cohabitation existed should be affirmed. The order of the trial court finding Mr. Betteridge in contempt should be affirmed. The order of the trial court granting Ms. Betteridge judgment for alimony arrearages and awarding her attorneys fees and costs should be affirmed.

Ms. Betteridge should be awarded her attorney fees and costs incurred in this appeal.

Mr. Betteridge should be sanctioned for abusing the court process and for filing a frivolous appeal.

RESPECTFULLY SUBMITTED this 12th day of July, 2004.

RICHMAN RICHMAN & JOHNSEN, LLC



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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of July, 2004, I caused two true and correct copies of the foregoing REPLY BRIEF OF APPELLEE to be mailed via first class, postage prepaid to:

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